

LAW OFFICES
MESSER, CAPARELLO & SELF
A PROFESSIONAL ASSOCIATION

215 SOUTH MONROE STREET, SUITE 701
POST OFFICE BOX 1876
TALLAHASSEE, FLORIDA 32302-1876
TELEPHONE: (850) 222-0720
TELECOPIER: (850) 224-4359
INTERNET: www.lawfla.com

May 24, 2002

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 010409-TP and 010564-TX

Dear Ms. Bayó:

Enclosed for filing on behalf of Talk America, Inc. are an original and fifteen copies of Talk America, Inc.'s Motion to Quash Subpoena Duces Tecum in the above-referenced dockets.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Floyd R. Self

FRS/amb
Enclosures
cc: Francie McComb, Esq.

DOCUMENT NUMBER-DATE

05585 MAY 24 02

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by the Citizens of)
Florida to Investigate TALK.com Holding)
Company and The Other Phone)
Company for Willful Violation of)
Rule 25-4.118, Florida Administrative)
Code)
_____)

Docket No. 010409-TP

In re: Investigation of possible violation of)
Commission Rules 25-4.118 and)
25-24.110, F.A.C., or Chapter 364, F.S.,)
by The Other Phone Company, Inc. d/b/a)
Access One Communications, holder of)
ALEC Certificate No. 4099, and Talk.com)
Holding Corp. d/b/a Network Services d/b/a)
The Phone Company, holder of ALEC)
Certificate No. 4692)
_____)

Docket No. 010564-TX
Filed: May 24, 2002

MOTION TO QUASH SUBPOENA DUCES TECUM

COMES NOW Talk America, Inc., f/k/a Talk.com Holding Corp., d/b/a Network Services, d/b/a The Phone Company, d/b/a The Other Phone Company, d/b/a Access One Communications (hereinafter collectively "Talk America") and files this Motion to quash the Subpoena Duces Tecum Quash and as basis states:

STATUS OF PROCEEDING

1. On October 23, 2001, the Public Service Commission (hereinafter "Commission") issued an Order to Show Cause in Docket Nos. 010409-TP and 010564-TX. The Order to Show Cause recited specific factual allegations, and concluded that the alleged facts constituted violations of Florida law by Talk America. The Order to Show Cause set forth proposed fines and other penalties, including cancellation of certificates of authority to operate; informed Talk America of its rights to an administrative hearing under Sections 120.569 and 120.57, F.S.;

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indicated the procedure to be followed to obtain the hearing; and stated the time limits which apply.

2. On November 6, 2001, Talk America filed a Request for Hearing pursuant to the Notice of Further Proceedings set forth in the Order to Show Cause, and Rule 28-106.111, Fla. Admin. Code. The Request for Hearing constitutes the initiation of a proceeding for purposes of Chapter 120, Fla. Stat.

3. From November 6, 2001 to May 15, 2002, the parties to the proceeding conducted discovery, primarily in the form of production of documents. Talk America filed several motions that were ruled upon by the presiding officer, consisting of a member of the agency head as authorized by Section 120.57(1)(a), Fla. Stat. Further, by Order No. PSC-02-0095-PCO-TP, issued January 16, 2002, the Commission granted in part and denied in part Talk America's motion to clarify and otherwise Amended the Order to Show Cause

4. On May 15, 2002, Staff Counsel issued a letter to Talk America, addressed to "To Whom It May Concern," advising that Commission Staff intended to visit the Palm Harbor, Florida offices of Talk America on May 16, 2002 "to verify representations by Talk America that significant changes in the Company's practices had occurred." The letter was sent by facsimile transmission to the office of Norman Horton, counsel of record for Talk America, at approximately 3:30 p.m. on May 15, 2002. Mr. Horton had previously advised Staff that he was out of town on May 15, 2002. The letter was filed with the Commission Clerk on May 17, 2002.

5. On May 16, 2002, at approximately 10:00 a.m., Commission staff appeared at the offices of Talk America in Palm Harbor, Florida. At that time, Commission Staff presented an employee of Talk America with a Subpoena Duces Tecum Without Deposition (hereinafter "Subpoena").

6. The Subpoena bore the docket numbers of this proceeding, and indicated that the Subpoena was issued by the Commission Counsel prosecuting this case through the Commission Clerk. The Subpoena was unaccompanied by a certificate of service, and has never been served on counsel for Talk America. The subpoena “commanded” that Talk America immediately produce 10 categories of documents, under threat of a judicial contempt citation.

7. Despite the fact that Talk America is subject to a Show Cause Order of the Commission and engaged in litigation under Chapter 120, Fla. Stat., and despite specific knowledge that Talk America is represented by counsel, the Commission Staff has attempted to effect discovery in these dockets in a manner unauthorized by the Uniform Rules of Procedure, Chapter 28-106, Fla. Admin. Code, or the Florida Rules of Civil Procedure adopted therein.

8. The Commission should quash the subpoena as it was not properly served, not lawfully issued, used for an improper purpose and abuse of the procedures available to parties.

THE ACTION VIOLATES THE UNIFORM RULES

9. This proceeding was brought and is being conducted pursuant to Chapter 120, Fla. Stat., as set forth in the Notice of Further Proceedings in the Order to Show Cause as amended. The procedures for the conduct of this proceeding are set forth in the Uniform Rules of Procedure. The Commission Staff has grossly violated those rules through the issuance of its unauthorized “Subpoena,” and that Subpoena must be quashed.

10. In 1996, the Florida Legislature amended Chapter 120, Fla. Stat., in an effort to make the Administrative Procedures Act more consistent and understandable. As part of the comprehensive amendments, the Legislature required the Administration Commission to adopt Uniform Rules of Administrative Procedure by July 1, 1997, including rules of procedure for the conduct of administrative hearings. Section 120.54(5), Fla. Stat. The uniform rules have been

adopted and are found in Chapter 28-106, Florida Administrative Code.

11. Section 120.54(5)(a)1., Fla. Stat., provides that "[t]he uniform rules *shall be the rules of procedure for each agency subject to this chapter* unless the Administration Commission grants an exception to the agency under this subsection." (emphasis added). The Administrative Commission has not granted an exception from Rule 28-106, Fla. Admin. Code, to the Commission. Therefore, the Uniform Rules regarding the conduct of this proceeding are binding on the Commission. See, *Gaston v. Department of Revenue*, 742 So.2d 517, 521 (Fla. 1st DCA 1999).

12. Rule 28-106.101, Florida Administrative Code, further provides that the uniform rules "shall apply in all proceedings in which the substantial interests of a party are determined by the agency and shall be construed to secure the just, speedy, and inexpensive determination of every proceeding." (e.s.).

13. Rule 28-106.206, F.A.C. provides that "[a]fter commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." As such, the provisions of Rule 1.410, Fla. R. Civ. P. are not an authorized method of discovery in administrative proceedings under the Uniform Rules.

14. Although the Subpoena did not cite the provision under which it was issued, Rule 1.410 Florida Rules of Civil Procedure is the only applicable rule under which the Subpoena could have been issued. Therefore, the issuance of the Subpoena by the Clerk and the prosecuting Staff counsel is in direct conflict with the provisions of Rule 28-106.206, Fla. Admin. Code, and Rule 1.350, Fla. R. Civ. P. adopted therein.

15. Rule 25-40.001, Fla. Admin. Code provides an exception to Uniform Rule 28-

106.212 for subpoenas. Rule 28-106.212 provides the mechanism by which a subpoena may be issued for attendance of witnesses at a deposition or for hearing. Therefore, the Rule from which the exception was granted is inapplicable to requests for production of documents from Talk America. In addition, the exception to Rule 28-106.212 applies only to the identity of the person who is authorized to issue the subpoena. The exception does not relate to the subject matter of the subpoena. Therefore, the exception to Rule 28-106.212 is irrelevant to the Subpoena issued in this case.

16. The Commission has neither sought nor received an exception to the Uniform Rules from the Administration Commission from the rules of discovery. Since the Commission Staff action in this case is in conflict with the Uniform Rules, the Subpoena must be quashed. See, Gaston, supra; Department of Corrections v. Saulter, 742 So.2d 368 (Fla. 1st DCA 1999).

A SUBPOENA IS NOT AN AUTHORIZED DISCOVERY ALTERNATIVE

17. The discovery rules available to parties under the Uniform Rules and the Florida Rules of Civil Procedure establish the procedures for parties to obtain discovery from other parties. The intent of the Commission Staff in issuing the Subpoena was to require the production of documents from Talk America for use in the Show Cause proceedings. This is not allowed.

18. The proper method to obtain documents from a party is to file a Request for Production of Documents pursuant to Rule 1.350, Fla. R. Civ. P. Under the discovery rules, a party is given 30 days to respond to the Request. Rule 1.350(b), Fla. R. Civ. P. It is neither appropriate nor required for a party to be required to produce documents upon demand by the other party appearing at the doorstep. The Commission Staff's efforts to circumvent the discovery rules by serving the Subpoena and demanding immediate production on the same day

is unauthorized, and the Subpoena must be quashed.

19. A subpoena under Rule 1.410, Fla. R. Civ. P. (even if it were applicable to discovery in administrative proceedings, which it is not) does not serve to circumvent document production under Rule 1.350, Fla. R. Civ. P. The Author's Comment to Rule 1.410 provides that "[t]he rule covers subpoenas ad testificandum and duces tecum for appearance or production at a trial or hearing or at the taking of a deposition." The Author's Comment goes further to recognize that "[a] distinction must be drawn between discovery under Rule 1.350 and the issuance of a subpoena duces tecum under Rule 1.410(b)(d)." Although the Rule has been amended since the 1967 Author's Comment, the amendments have not altered the fundamental distinction between discovery and appearance at trial or for deposition.

20. Since the Subpoena is not authorized as a discovery tool in this proceeding, the Subpoena must be quashed.

THE COMMISSION IS LIMITED TO ITS ROLE AS A PARTY

21. Once the Commission issued its Order to Show Cause, and Talk America requested a hearing, the Commission was in prosecution mode with its prosecution Staff charged with undertaking the actual prosecution of the case. Once so joined, the Commission's ability to investigate any matter related to the prosecution is limited solely to the discovery measures allowed by the Uniform Rules.

22. In *Conval Care, Inc. v. Agency for Health Care Administration*, 647 So.2d 300 (Fla. 1st DCA 1994), the AHCA sought to terminate Conval Care, a Medicare provider, for alleged violations of payment regulations. Conval Care filed a Petition for hearing to contest the proposed AHCA action.

23. While the case termination was pending, the AHCA sought documents from

Conval Care, without resort to the discovery rules, under its broad and comprehensive authority under Section 409.913, Fla. Stat., authority “to oversee the activities of Florida Medicaid recipients, and providers and their representatives, to ensure that fraudulent and abusive behavior and neglect of recipients occur to the minimum extent possible, and to recover overpayments and impose sanctions as appropriate.”

24. In an appeal of the independent investigation production, the Court denied the production sought by the AHCA. The Court found that Conval Care was justified in refusing to relinquish documents because the AHCA had no investigatory purpose independent of the administrative proceeding for obtaining the documents. The Court held that;

the agency was not permitted to take further action in the termination and recoupment proceeding except as a party litigant. . . . under the facts before us, the agency should have sought appellant’s documents with a request pursuant to Florida Administrative Code Rule 60Q-2.019 [now Rule 28-106.206], which authorizes discovery through applicable Florida Rules of Civil Procedure for parties to a section 120.57(1) administrative hearing.

Conval Care at 301.

25. In the present case, the Commission Staff attempted to obtain documents through the authority under Rule 25-4.019(3), F.A.C., provides “[u]pon notification to the utility, members may, at reasonable times, make personal visits to the company offices or other places of business within or without the State and may inspect any accounts, books, records, and papers of the company which may be necessary in the discharge of Commission duties.” That authority is similar in scope and tenor to the authority of the AHCA under Section 409.913, Fla. Stat. Unquestionably, the May 16th Subpoena was directly employed to obtain Talk America documents for use in the proceeding. The Subpoena bore the case styles and docket numbers,

and was issued at the direction of the prosecuting counsel for the Commission. The role of the Commission Staff in this proceeding is one of a party, and the Staff should not act outside of that role in its prosecution of this case.

26. Since the Commission Staff has acted outside of its authority as a party to the proceeding as set forth in Chapter 120, Fla. Stat., the Uniform Rules, and the ruling in *Conval' Care*, the Subpoena must be quashed.

THE SUBPOENA WAS ILLEGALLY SERVED

27. Even if Rule 1.410, Fla. R. Civ. P. was an acceptable method of discovery under the Uniform Rules, the method of service of the Subpoena by the Commission Staff was illegal.

28. Rule 1.410(d), Fla. R. Civ. P., provides that “[a] subpoena may be served by any person authorized by law to serve process or by any other person who is not a party and who is more than 18 years of age.” In this case, the subpoena was served on a Talk America employee by Dale R. Buys, an employee of the Commission in its Division of Competitive Markets and Enforcement. Mr. Buys is the Commission Staff person who recommended issuance of the show Cause Order to the Commission, he is indicated in the Commission records as the primary technical Staff person for the dockets, and he has been the lead investigatory analyst for the Commission throughout this proceeding. It is possible, if not probable, that Mr. Buys would be a witness in this proceeding.

29. Mr. Buys is not a Sheriff, process server, or other person authorized by law to serve process. Section 48.021, Fla. Stat. Rather, he is an employee and agent of the Commission Staff, a party to this proceeding.

30. Since the person serving the Subpoena on Talk America is an employee and

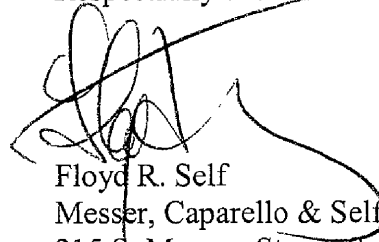
agent of the Commission, he was not authorized to serve the Subpoena. Therefore, the Subpoena must be quashed.

CONCLUSION

31. The attempt by the Commission Staff to use the subpoena as a search warrant, and the clear intent to deny Talk America of the opportunity to have the request reviewed by counsel and avail itself of the provisions of the discovery rules, demonstrate a disregard for basis due process available to Talk America. The Commission Staff had absolutely no authority to serve the Subpoena as it did, nor is there any justification for the Staff to avoid complying with the discovery rules with which they expect other parties to comply.

WHEREFORE, Talk America respectfully requests that the Subpoena Duces Tecum be quashed and the Commission Staff be directed to comply with Uniform Rules of Procedure, including discovery rules, for the remainder of this proceeding.

Respectfully submitted



Floyd R. Self
Messer, Caparello & Self P.A.
215 S. Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876
(850) 222-0720

and

Steve Augustino
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

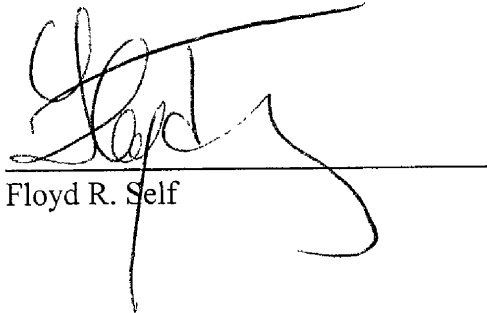
Attorneys for Talk America, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of Talk America, Inc.'s Motion to Quash Subpoena Duces Tecum in Docket Nos. 010409-TP and 010564-TX have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 24th day of May, 2002.

Patty Christiansen, Esq.*
Division of Legal Services, Room 370
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Charles Beck, Esq.
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400



Floyd R. Self